IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 48 MAP 2024

PATRICK M. CICERO,

Appellee

v.

PENNSYLVANIA PUBLIC UTILITY COMISSION
EAST WHITELAND TOWNSHIP,

Appellant.

BRIEF OF AMICI CURIAE PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION IN SUPPORT OF APPELLEE PATERICK M. CICERO

APPEAL FROM THE JULY 31, ORDER OF THE COMMONWEALTH COURT AT NO. 910 CD 2022, REVERSING THE DECISION OF THE PUBLIC UTILITY COMISSION AT NO. A-2021-3026132, ENTERED JULY 29, 2022

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STATEMENT OF INTEREST OF AMICI CURIAE

The Pennsylvania Municipal Authorities Association ("PMAA") is the recognized association for municipal authorities in the Commonwealth of Pennsylvania. Founded in 1941, PMAA was established "...to assist authorities in providing services that protect and enhance the environment, to present a united and common front in advocating favorable legislation and opposing detrimental legislative proposals, and to promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens." PMAA represents over 700 municipal authorities across the state that provide drinking water, sewage treatment, waste management, and recreational and community projects valued at billions of dollars to over six million Pennsylvania citizens. Additionally, PMAA is vitally interested in the determination of the points of law involved in this appeal, in that the rights and properties of its members may be involved in the future in similar litigation in which the decision being appealed may have a considerable bearing.

The Petitions for Allowance of Appeal filed by Aqua Pennsylvania Wastewater, Inc. ("Aqua") and East Whiteland Township ("Township") should be denied because the July 31, 2023, Opinion of the Commonwealth Court at issue is based upon sound legal precedent rather than an abuse of discretion. The Commonwealth Court's decision was based on application of existing case law, rather than creation

of a new, reversible standard. PMAA believes that, in view of the importance of the points of law here involved and the magnitude of the possible effects of their determination on the rights and liabilities of its members across the Commonwealth of Pennsylvania, The Commonwealth Court's Opinion should be upheld.

QUESTIONS PRESENTED

1. Whether the Commonwealth Court exceeded its scope of review and authority by reversing the Order of the Pennsylvania Public Utility Commission under existing law.

   Suggested answer: no.

2. Whether the Commonwealth court erred and abused its discretion in applying the affirmative public benefits test under existing caselaw.

   Suggested answer: no.

3. Whether the Commonwealth court erred and abused its discretion in holding that benefits not specific to the transaction could not be counted as true benefits under existing law.

   Suggested Answer: no.

ARGUMENT

I. THE COMMONWEALTH COURT'S OPINION SHOULD BE UPHELD FOR PUBLIC POLICY REASONS.

PMAA is the "... primary voice of community-based services representing the interests of more than 2,600 municipal authorities across the Commonwealth. Services provided by the Association include advocacy on governmental affairs issues, education and training, and group programs. Pennsylvania Municipal Authorities Association, *The Authorities Home Page*, (Nov 26, 2024), https://www.municipalauthorities.org/. As such, PMAA is uniquely qualified, and situated to address the issue of privatization of municipally owned water and wastewater systems. At the consumer level, privatizing a utility service can lead to severe rate increases for customers. As seen in the case at bar, Aqua's mere acquisition of Township's system will likely cause rate increases for both existing Aqua customers as well as Township's ratepayers. Coupled with the fact that Township's system is not one that is currently in distress, it is by all accounts, a healthy and well managed system, operated by an authority serving its customers, not its profit motivation. This means that Aqua's acquisition of the system would provide ratepayers with essentially the same services currently and aptly provided by the Township, at an increased cost.

Both the Commission and Aqua contend that the Commonwealth Court's opinion will breed poor public policy.[1] This could not be more inaccurate. In fact, to set forth an argument that a large, investor-owned utility should be permitted to acquire a healthy, public wastewater system with virtually no evidence that the transaction will yield a true public benefit easily flies in the face of good public policy. If anything, Commonwealth Court's opinion stands in the way of large utilities, and indeed, the Commission, from taking advantage of the public by acquiring a wastewater system and providing the same services at a greater cost. Under no circumstances can such be considered a benefit to ratepayers.

Water for profit should always be a last resort.

PMAA maintains its proven mantra: "When a municipally owned water or wastewater system is sold to a for-profit corporation, rates often increase significantly. This happens because the purchasing company seeks to recover the high acquisition costs and generate profits for shareholders. These costs are passed on to consumers through higher bills". Pennsylvania Municipal Authorities Association, *Know the Facts!* (Nov 26, 2024),

[1] The Commission and Aqua argue that the Court changed the legal standard and created a test that is designed to ensure that a rejection of proposed acquisitions will occur. While on a surface level, Aqua's acquisition of Township's system, or indeed the acquisition of any municipally owned system by a large, investor-owned utility, may seem a benefit to all involved, such a practice on a wide scale is detrimental to public policy.

https://www.municipalauthorities.org/resources/know-the-facts/. Additionally, one of the largest so-called "benefits" to come from such a transaction, the amount paid by the acquiring utility, is also paid for by consumers through higher rates.[2] PMAA provides: "The cost of this cash infusion is ultimately paid by consumers through higher rates, and long-term, the higher the rate, the more profit to the private company's shareholders and higher compensation for their executives". *Id.*

As such, any new developments in the Township paid for by the cash infusion Township receives from Aqua, will truly be paid for by consumers, not the corporation. In essence, should the Commonwealth Court's opinion be reversed, consumers will be sold down the proverbial river by a Commission meant to balance their best interest. The Commission has purported itself to be on the side of what is best for the public good. In fact, the Commission has stated that its duty is to "...balance the needs of consumers and utilities; ensure safe and reliable utility service at reasonable rates; protect the public interest; educate consumers to make independent and informed utility choices; further economic development; and foster new technologies and competitive markets in an environmentally sound manner". Pennsylvania Public Utility Commission, *About*

[2] The Commission and Aqua provide that Township can use the profits from the sale to focus on other community aspects, stating that the transaction will provide necessary funds for such projects. This is inaccurate, in truth, ratepayers will provide such funds.

the PUC PA PUC (Nov 27, 2024), https://www.puc.pa.gov/about-the-puc/. To claim to be an entity that balances consumer needs and utilities, and then to not only allow, but to outwardly support a large investor-owned utility's acquisition of a healthy system to provide mirrored services to consumers at a higher price, is unconscionable. To say that such a transaction passes the affirmative public benefits test would be an affront to common logic. If the Commission truly believes that Aqua's acquisition of Township's system (and other similar transactions) serves the public's best interest, they have utterly failed their mission statement.

II. THE COMMONWEALTH COURT DID NOT EXCEED ITS SCOPE OF REVIEW WHERE THE STANDARD OR REVIEW PERMITS THE COURT TO REVIEW FOR AN ERROR OF LAW OR LACK OF SUBSTANTIAL EVIDENCE.

The Commonwealth Court held in the matter preceding the appeal at hand, that the Pennsylvania Public Utility Commission ("Commission") abused its discretion in its conclusion that Aqua established substantial affirmative benefits in relation to Aqua's acquisition of the system. The issue has been raised on appeal, that such action by the Commonwealth Court exceeded the Court's scope of review unrelation to review of the Commission's order. The relevant appellate standard of review for a Public utility Commission order is: "...limited to determining whether

a constitutional violation, an error of law, or a violation of Commission procedure has occurred and whether necessary findings of fact are supported by substantial evidence". *New Garden Township v. Pennsylvania Pub. Util. Comm'n*, 244 A.3d 851 (Pa. Cmmw. 2020). This standard provides only limitations to the reviewing Court, rather than a bar on judicial review of a Commission.[3]

The limitations imposed upon a reviewing Court were further explained by the Supreme Court of Pennsylvania, stating: "That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion. *Blumenschein v. Hous. Auth. of Pittsburgh,* 109 A.2d 331, 335 (Pa. 1954).[4] The aforementioned does not preclude altogether judicial review of an agency decision akin to the present matter, precedent merely limits a reviewing court such that it may disturb the Commission's interpretation regarding a certificate of public convenience ("CPC") where "...the result is clearly erroneous, arbitrary, and unsupported by substantial evidence". 2 Pa.C.S.A. § 704. *Elite Industries, Inc. v. Pennsylvania Pub. Util. Commn.,* 832 A.2d 428 (Pa. 2003).

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[3] Though it is true, that the standard of review shows deference to the Commission's decisions. The Supreme Court has provided that in cases such as the present: "...on account of the Commission's expertise in the utility arena, reviewing courts accord considerable deference to the agency concerning the certification process". *Popowsky v. Pennsylvania Pub. Util. Commn.,* 937 A.2d 1040, 1054 (Pa. 2007).

[4] Although these limitations have been long upheld, they are just that, limitations.

Furthermore, the Commission's discretion is not absolute and is subject to review such that: "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or *where the law is not applied* or where the record shows that the action is a result of partiality, prejudice, bias or ill will". *Com. v. King*, 839 A.2d 237, 240 (Pa. 2003). As such, the Commonwealth Court in the present matter exercised its review within required scope, as it is within the Court's preview to review the Commission's order for error of law or abuse of discretion. It has been held that "If a trial court erred in its application of the law, an appellate court will correct the error". *Com. v. Hernandez,* 886 A.2d 231, 235 (Pa. Super. 2005) (citing to *Commonwealth v. Horce,* 726 A.2d 1067, 1068 (Pa. Super.1999). This case arises from the Public Utility Commission's legal determination that Aqua met its standard of proof as required by Pennsylvania law. Such a contention required the court to review the application of that law for error. As such, the court was well within its scope to review for inaccurate application of applicable law on review to discern whether an error of law had been committed by the commission.

In the Commonwealth Court's opinion, the Court determined that, under applicable case law such as *Popowsky, City of York,* and *McCloskey* the Commission's determination did not meet the legal standard of the substantial affirmative benefits test. The fact that the Commonwealth Court found such error

of law upon evaluation does not itself lead to exceeding the scope of review.[5] The Commonwealth Court reviewed the Commission's decision within the applicable scope of review and came to the conclusion that the Commission committed an error of law in applying the test that has long been upheld as the appropriate test for granting an application to acquire a system such as the one in the present matter: the affirmative public benefits test.

III. THE COMMONWEALTH COURT DID NOT ERR OR ABUSE ITS DISCRETION IN CONCLUDING THAT AQUA HAD NOT MET ITS BURDEN UNDER THE AFFIRMATIVE PUBLIC BENEFITS TEST PURSUANT TO *POPOWSKY*, *CITY OF YORK*, AND *MCCLOSKEY*.

This matter arises out of the burden of proof placed on an acquiring utility under Sections 1102 and 1103 of the Public Utility Code ("Code"). Section 1102 (a) (1) requires any public utility to acquire a certificate of public convenience ("CPC") before it may "...begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by: (i) A certificate of public convenience granted under this part...". Section 1102 (3) further provides that a CPC is necessary for a public utility to

[5] While it has been contended that the Commonwealth Court substituted its views for that of the Commission, this assertion is inaccurate.

"... acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service". Section 1103 of the Code provides the parameters for granting a CPC. As such, Section 1103 (a) states: "A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public".

The Supreme Court further clarified the standards imposed by Sections 1102 and 1103 in *City of York v.* making clear that a CPC should not be granted "...unless the Commission is able to find affirmatively that public benefit will result from the merger". *Id.* at 828. Furthermore, the Supreme Court has made clear that Pennsylvania law requires assurances of a substantial public benefit to support regulatory approval. Popowsky v. Pennsylvania Pub. Util. Commn., 937 A.2d 1040, 1043 (Pa. 2007).

The test developed by previous case law, the affirmative public benefits test, requires the Commission to make factually based determinations rather as to expected public benefits: "In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where

this may be impractical, burdensome, or impossible...". *Id.* at 1057. While legal commitments are not necessary to meet the affirmative public benefits test standard, the factually based determinations the court referenced are subject to a preponderance of the evidence standard: "...rather, the PUC properly applies a preponderance of the evidence standard to make factually based determinations (including predictive ones informed by expert judgment) concerning certification matters". *Id.* Such a standard "... means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party". *Energy Conservation Council of Pennsylvania v. Pub. Util. Commn.*, 995 A.2d 465, 478 (Pa. Cmmw. 2010) (Citing *O'Toole v. Borough of Braddock,* 397 Pa. 562, 564, 155 A.2d 848, 850 (1959)).

In *McCloskey v. Pennsylvania Public Utility Commission*, the court provided that the affirmative public benefits test is more than a mere absence of any adverse effect on the public. 195 A.3d 1055 (Pa. Cmwlth. 2018). This means that proponents of a merger must demonstrate that the merger will affirmatively promote the service, accommodation, convenience, or safety of the public in a substantial way. *Id.* Specific to *McCloskey*, as well as the current case at hand, was the issue of rate increases to customers. *Id.* The *McCloskey* Court held that an applicant is required not only to show that no harm will come from the transaction, but also to establish that substantial affirmative benefits flow to ratepayers. *Id.* at

1064. The Court ultimately remanded the Commission's opinion for review of the impact on rates, as failing to consider this aspect led to a failure in determining whether the acquisition would yield a substantial affirmative benefit. *Id.* at 1067. As seen in the aforementioned case, rate increases to customers can be a substantial factor in determining a transaction's true benefit or detriment to the public.

In the matter currently before the court for review, the prospect of rate increases to both Township's customers and Aqua's existing customers is a substantial element that warrants more deference in the affirmative benefits analysis than afforded by the Commission. It has been estimated that the increase to System ratepayers and Aqua's current ratepayers related to the revenue deficiency associated with the proposed rate base addition to Township's existing rates, could be as high as 132.93% if 100% was to be recovered from System ratepayers, going from $33.00 per month to $77.64 per month (Com Opinion at 11). The Commission emphasized that this deficiency was only a preliminary analysis of the potential impact on rates, though this notion is less than comforting, as this preliminary analysis may indicate that the figure could be lower, or in fact, higher than the current estimate. Such a detriment to ratepayers should not be cast aside merely because the figure is not yet set in stone. By all accounts to date, it seems that ratepayers will see an increase in rates should Aqua acquire the system.

The "benefits" the Commission used to supposedly satisfy the legal standard required (the affirmative public benefits test), boil down to Aqua's capabilities that stem from its size and technical ability as an investor-owned utility. Indeed, East Whiteland Township's current system is by all accounts, healthy, and not in a state of disrepair. The transaction at issue is not one of an investor-owned utility acquiring a damaged system in great need of repair. Rather, East Whiteland Township is a municipality capable of continuing to manage its system without subjecting ratepayers to the substantial rate increase Aqua's acquisition would likely impose.

The benefits the Commission relied on are benefit already offered to customers by the Township, thus they are not true benefits of the transaction. One such benefit proposed is the availability of 24/7/365 customer service. Currently, Township already possesses such a service and offers it to ratepayers. As such, this service is not a benefit that affirmatively promotes the service, accommodation, convenience or safety of the public in a substantial way, as required by law (*City of York* at 828). Rather, this would be a continuation of a service already provided by a capable utility with a high price tag for ratepayers. Furthermore, other benefits cited by the Commission are akin to the above, rather than affirmative benefits, the Commission provides services and capabilities Aqua possesses merely from being a large investor-owned utility as evidence of a public benefit. This amounts to

more of the same: interchangeable service to that provided by the Township, at a greater cost to ratepayers. In short, providing the same services at a higher cost does not amount to public benefit. *McCloskey* provides that fitness is assumed where an acquiring utility is already certificated. *Id.* at 1058. There is no doubt that, while fitness is a presumed factor that favors Aqua as a large, already certificated utility, however, this alone does not satisfy the standard put in place under Pennsylvania law. *McCloskey, City of York*, and *Popowsky* have established precedent that an affirmative benefit to the public must come from a transaction involving a public utility. While Aqua is a capable investor-owned utility, this alone does not satisfy the affirmative public benefits test. Especially in a situation where the current Municipal system owner has shown that it has similar capability to effectively manage the system, as a lower cost to ratepayers.

CONCLUSION

In conclusion, for the forgoing reasons, PMAA respectfully asks that the Court denies the Petition for Allowance of Appeal filed by Aqua Pennsylvania Wastewater, Inc., and East Whiteland Township, and uphold the opinion of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Michael J. Witherel, Esq.

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